VIRGINIA LAW REGISTER

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Was the Error in the Instructions?

The decision of the Supreme Court of the United States in N. & W. Ry. Co. *v.* Holbrook, handed down January 5, 1915, is one which cannot meet with unqualified approval from any standpoint we have been able to find. It seems to us to be absolutely unjustifiable from the standpoint of justice, right reason or authority and exemplifies more than ever the absurdity of our method of instructing juries. The facts are briefly these: Holbrook, a bridge carpenter in the employ of the N. & W. Ry., earning $2.75 a day, was killed by the apparently unquestioned negligence of the railway company. He left a widow and five little children, the oldest fourteen, the youngest one year of age. The jury returned a verdict of $25,000 in favor of the widow in a suit brought in the Western District of Virginia. But one assignment of error was considered by the Supreme Court, which reversed Judge McDowell and the Circuit Court of Appeals for the Fourth District—the one for giving and the other for approving the following instruction:

> "The court further instructs the jury that if they believe from the evidence that plaintiff is entitled to recover, then the amount of her damages is, subject to diminution, if any, as set out in instruction No. 4, to be measured by the pecuniary injury suffered by the widow and infant children as the direct result of the death of the husband and father, it not being permissible for the jury to go beyond the pecuniary loss and give damages for the loss of the love of the husband or father by wife or children, or to compensate them for their grief and sorrow or mental anguish for his death, or other purely sentimental injury or loss.
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> "However, the court instructs you that where the persons suffering injury are that dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries were all adults or dependents who were mere next

of kin, so that the relation existing between deceased and the infant beneficiaries prior to his death is a factor in fixing the amount of the merely pecuniary damages. Bearing the above principles in mind the jury should assess such damages, not exceeding $40,000, the amount claimed in the declaration, as shall fully compensate the widow and children for all pecuniary loss, as hereinafter explained, suffered by them as the direct result of the death of the husband and father, and in doing so the jury should consider:

"(1) What the earning capacity of deceased has been prior to and was at the time of his death, and what it probably might have been in the future had he not been killed, at the same wages he was receiving at the time of his death, as shown by the evidence; and, in estimating the probable earnings of decedent, and what his family might have realized from them during his future life had he not been killed, and, in estimating the length of his probable life had he not been killed, it will be the duty of the jury to consider his age, health, habits, industry, intelligence, character, and expectancy of life as shown by the evidence introduced before you.

"(2) The jury will also take into consideration the care, attention, instruction, training, advice, and guidance which one of decedent's disposition, character, habits, intelligence and devotion to his parental duties, or indifference thereto, as shown by the evidence, would reasonably be expected to give to his infant children during their minority, and the pecuniary benefit therefrom to said children, and include the pecuniary value of the same in the damages assessed."

The Court, MacReynolds, J., delivering the opinion, declares that the lower Court erred "when it declared that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father the pecuniary injury suffered would be much greater than where the beneficiaries were adults or dependents who were mere next of kin," and *for this reason alone* reversed the case and sent it back for a new trial. When we read this we must confess something brought back Constance's despairing cry,

"He talks to me who never had a son"

for surely even as impartial and high a Court as that deciding this case, if it be composed of those who have had infant children, must know that the pecuniary loss of a father is far, far greater to his infant children than to those no longer needing

his services for their support. Even from the "money standard" which the Court insists upon, this is absolutely true, and to lay down any other rule seems to us almost to fly in the face of authority. Baltimore, etc. *v.* Mackey, 157 U. S. 72; Michigan C. R. Co. *v.* Vreeland, 227 U. S. 59.

Mr. Justice McKenna dissents in an opinion of great force, concurred in by Day and Hughes, JJ.

We cannot forbear quoting from it: "I think the criticism that the railway company makes of the charge of the court to the jury is too severe in inference, and makes a single sentence in a charge which occupies a page of the record exclusively dominant, pushing aside all qualifications and particulars. I do not think this is permissible. The charge of a court to a jury must be considered as a whole, not by isolated sentences, and a jury, as one of the tribunals of the country, must be presumed to have some sense.

"The court in the case at bar was confronted with the difficulty with which courts are often confronted, and which no court has yet been able completely to surmount by any form of words,—of bringing home to itself or to a jury the loss to wife and infant children through the death of the husband and father. The court in the present case ventured to say that these relations had something more in them and their destruction had something more of 'pecuniary injury' than the injury to 'the mere next of kin,' and that there might be a loss to infant children greater than to adults. Would any one like to deny it? Would not its denial upset all that is best, in sentiment and duty, in life? And must that sentiment and duty, so potent in motive and conduct, be illegal to emphasize in a court of justice as an interference with the strict standards of the law?

"By these standards, I admit, the charge of the court must be determined, and therefore let us turn to them as applied by the district court. The court said the amount of recovery must 'be measured by the pecuniary injury suffered by the widow and infant children, as the *direct result* of the death of the husband and father, it not being *permissible for the jury* to go beyond the *pecuniary loss* and give damages for the *loss of the love of the husband or father by wife or children, or to compensate them for their grief or sorrow or mental anguish for his death, or other*

purely sentimental injury or loss.' (Italics mine.) Can there be any mistake in the standard declared by the court? Not love, not sorrow, not mental anguish, not sentiment, but loss in money 'as the direct result of the death,' and beyond that money loss 'it not being permissible for the jury to go.' The standard, then, is money loss, or, to use the court's words, 'the pecuniary injury suffered.' No prompting to or excuse for impulse or passion was given, nor was imagination left any sway. The judgment of the jury was brought and held to the money value of the life destroyed to wife and children dependent upon it."

Mr. Justice McKenna also gives a decided hit at counsel for the railway company, who actually insisted that "matter suitable in an opinion of an appellate court may be inappropriate in a charge to a jury," language to which we invite the attention of those who magnify the value of cases. We are at a loss to see, as McKenna, J., says why "law declared by an appellate court is unsuitable to be followed by a trial court." But we are at such a loss to see how the great tribunal arrived at its conclusion that we say no more. We only ask, why, if the amount of damages in money was the only question, the Court instead of reversing the case should not have directed an abatement?

Have Juries Any Sense?

The stinging remark of Mr. Justice McKenna in his dissenting opinion quoted above might well cause the courts to consider very carefully the instructions with which lawyers load down their cases—and the courts. "A jury," the Justice says, "as one of the tribunals of the country must be presumed to have some sense."

Why they have any left after considering some of the instructions hurled at them has always been a marvel to us. Stale and trite propositions of law, culled from a hundred cases, are hurled at them. "Reasonable doubt; hypothesis of innocence; the continuation of reasonable doubt in every portion of the case"—we once saw a long line of such instructions given to the same jury in three separate and distinct cases, the same *venire* being used in each case. The jury forgot to take these with them in the last

case and they were hurried to their room with breathless haste by an indignant sheriff. We are credibly informed that the jury never read them in either case, and we do not much blame them.

Keith, P., very mildly suggested in Wallen *v.* Wallen, 103 Va. p. 157: "We again call attention to what this Court has said on more than one occasion with respect to the danger of multiplying instructions. Every instruction unnecessarily given increases the chances of reversal. Thirty instructions were given in this case, when, as it seems to us, a few elemental principles of law thoroughly established by the decisions of this Court would have been sufficient to guide the jury to a correct conclusion."

Indeed our Court of Appeals of late years has shown a decided tendency towards minimizing as far as possible the evils caused by our system of instructions. In the case of Ney *v.* Wren, decided January 12, 1915, the Court again lays down the rule that where instructions fairly and fully submitted to the jury the case on every material point involved applying the law to the facts which the evidence tended to prove as justly and fairly as the respective parties to the controversy could reasonable have asked, it is not error to refuse other instructions. The Court cites Bowman *v.* First National Bank, 115 Va. 463; Luck Construction Company *v.* Russell, 116 Va. 365, and cites Chesapeake & Ohio Railway Co. *v.* McCarty, 114 Va. 181, to show that instructions in a case are to be read as a whole and if when so read it can be seen that the instructions could not have mislead the jury, their verdict will not be disturbed even though one or more of the instructions are defective. We may by aid of the Court by and by reach that happy condition when instructions shall not be used for the purpose of befogging the jury and asked for by a desperate lawyer in hopes of reversing a bad case.

The Automobile and the Rights of the States.

We have just finished reading the Life of Thomas Ritchie—remembering with some amusement a caricature, seen in our younger days, of the old gentleman sinking in the sea of Whig votes with the Resolutions of 1798-99 firmly clasped in his hand. We wonder if he could have seen the trend of our Gov-

ernment today, whether he would not gladly have been drowned. And yet now and then a gleam comes across the shadow of Nationalism and we are graciously permitted to have some rights in the States, when Congress has been pleased to be inactive.

The automobile furnishes the last decision of the subject. In Hendrick *v.* State of Maryland, decided by the Supreme Court of the United States January 5, 1915, the Court decides that State laws regulating motor vehicles are valid until they are displaced by Federal legislation. Mr. Hendrick drove his machine out of the District of Columbia into the State of Maryland without properly "tagging" himself and paying the license required by the Maryland law. The ever watchful constable did the "tagging" act, and haled Mr. Hendrick before the magistrate, who promptly gave him the limit. Hendrick appealed to the interstate commerce clause of our Constitution and as a citizen of the District of Columbia claimed he had the right of free egress and ingress over the roads of the States of this Union and that Maryland unconstitutionally interfered with him by attempting to regulate interstate commerce; not only this, but discriminated against him and violated his rights as a citizen and exacted a tax for revenue according to arbitrary classification—machines being taxed by horsepower. But the Supreme Court said him "nay" and in an opinion rendered by Mr. Justice McReynolds decided that Hendrick had no standing in Court, because the record did not show that he had even complied with the laws of the District of Columbia in respect of registration of motor vehicles or applied to Maryland for an identifying tag—prerequisites to a limited use of the highways without cost by residents of other States under the plain terms of the Maryland law. The Court in addition held that in the absence of national legislation covering the subject a State may rightfully prescribe uniform regulations necessary for public safety and order in respect to the operation upon its highways of all motor vehicles—those moving in interstate commerce as well as others, and that registration of vehicles, licensing of drivers, charging therefor reasonable fees graduated according to the horsepower of the machines, was not a direct and material burden on interstate commerce. The Court further holds that there can be no serious doubt that where a State at its own expense furnishes special facilities for the use

of those engaged in commerce, it may exact compensation therefor and the rates and methods of collection are primarily for the State itself, so long as they are reasonable, uniform and fair. There can be no question that this decision is eminently timely and correct. It would be a monstrous proposition that the owner of a motor-vehicle should have the right to use the roads of all the States of this Union in defiance of regulations intended to protect the property, health, safety and comfort of citizens merely because he was a citizen of a different State than the one in which he was running his machine.

Who Controls a Motor Car?

We do not mean in the actual sense of driving it. But the question is when an owner of a car lends it to another person who by negligent driving causes damage to a third party, can the owner be held responsible? The general rule is that he cannot. The case of Reichardt *v.* Shard lately decided in the Divisional Court and Court of Appeal of Great Britain, however, seems to warrant the proposition that if the owner of a car retains control of it, he is liable for the negligence of a person who drives it with his consent though the latter is using it for his own purposes.

The facts are that the owner of a car allowed his son to use it, but only when his own chauffeur was in the car. The son was running the car, the chauffeur sitting by him, and the car collided with and damaged the car of the plaintiff. The County Court, Divisional Court and Court of Appeal successively held that the defendant had not parted with the control of his car and was liable. There was no evidence that the chauffeur was guilty of negligence in supervising the son's driving, or that the son was under age. The presence of the chauffeur seems to be the turning point in the case, though one judge intimated—without evidence to support it—that the son was out on his father's business and was therefore his agent. The moral of this decision is that owners should never lend their chauffeurs with their cars.

The attention of members of the profession who are both officers of banks and counsel for same should be called to the provisions of § 22 of the Federal Reserve Act, and § 37 of the Criminal Code (U. S. R. S., § 5440).

Federal Reserve Act —Fees of Commission Paid to Officers, Directors and Employees.

"Section 22 of the Federal Reserve Act provides as follows:

"'Other than the usual salary or director's fee paid to any officer, director, or employee of a member bank and other than a reasonable fee paid by said bank to such officer, director or employee for services rendered to such bank, no officer, director, or employee or attorney of a member bank shall be a beneficiary of, or receive, directly or indirectly, any fee, commission, gift or other consideration for or in connection with any transaction or business of the bank. * * * Any person violating any provision of this section shall be punished by a fine of not exceeding $5,000 or by imprisonment not exceeding one year, or both.'

"Section 37 of the Criminal Code (U. S. R. S., § 5440) of the United States provides as follows:

"'If two or more persons conspire either to commit any offense against the United States or to defraud the United States in any manner or for any purpose and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars or imprisoned not more than two years or both.'"

Of course fees for services rendered the bank by counsel are expressly excepted from the operation of the Act; but two important questions arise: First, can a lawyer who is a director or officer of a bank draw a deed of trust or mortgage for a borrower proposing to borrow from the bank and pledging the security for which the deed or mortgage is given and charge a fee to the borrower for same? It seems to us not, but we do not believe it has been considered heretofore as illegal.

Second, can a director or officer who is an insurance agent or agent for a surety company insure the buildings belonging to the bank or issue a burglar insurance policy or bond any officer or employee of the bank and receive commission therefor?

Counsel for one of the great bonding companies has advised: "First, if an officer, director or a employee of a member bank

procures to a surety company the surety business of his bank, by which we understand, generally, the bonding of its employees, and receives from the surety company commissions on such surety business, such officer, director or employee violates § 22 of the Federal Reserve Act and commits an offense against the United States.

"Second, if the surety company, or its officials, should pay such commissions to such officer, director or employee, or permit him to retain such commissions from the amounts collected by him for the surety company, with knowledge of the fact that such officer, director or employee is violating the provisions of § 22 of the Federal Reserve Act, then the surety company, or its officials, while not committing an offense under § 22 of the Federal Reserve Act, might be held guilty of a conspiracy, under § 37 of the Criminal Code, to commit an offense against the United States and be liable to the penalties of that section."

By parity of reasoning the same rules would apply to officers or directors of banks in the Reserve System who would insure the bank building or contents, or issue burglar insurance and receive commission thereon, even when paid by the companies they represent.

This seems a very harsh and unnecessary law, but it seems to be the law and care should be exercised to see that it is not violated in the slightest degree.

Case-Law— Case-Judges. Case-Lawyers—

We cannot forbear giving our readers the following extract from our "pleasant neighbor" (may it be a long time before any one shall conclude the quotation "gone before"); not only because it is something we would like to have written ourselves (*Pereant qui ante nos nostra dixerunt*), but because we have several times written on the same subject, and also because it quotes from one of our learned Virginia judges of a "nobler day."

In its January number *Law Notes* says as follows:

> Justice Carr, in Watkins *v.* Crouch, 5 Leigh 567, concludes his opinion in the following language: "It will be observed that

I have cited no cases in support of this opinion; not that I have not read, and considered, and puzzled myself with, the multitude that were commented on in the argument; but because, finding them like the Swiss troops, fighting on both sides, I have laid them aside, and gone upon what seems to me the true spirit of the law." We venture to say that the opinions in the reports would be as convincing—certainly more readable—if the judges generally were more inclined to follow Justice Carr's example. We have heard much about the case lawyer. Shall we be guilty of lese majesty if we say there are also case judges? Many of our court opinions fairly bristle with citations. Every proposition enunciated is buttressed with them, making the opinion more resemble an annotation than a juridical exposition. Judges must of course have and study the cases in order that they may, preadventure, determine what the law is upon a given subject. But they interlard their opinions with them? Are the cases any more than the scaffolding for the erection of the judicial edifice, which should not be permitted either to encumber or to deface the completed structure? The great judges of the past did not crowd their opinions with profuse citations. In the alembic of their minds most of the cases were distilled into the text. The few that appeared in the opinion were integral parts of it. They "belonged," and served to knit the opinion together into a homogenous whole. In the latter days, of course, cases do more abound. But this does not necessitate their cumulative use, nor, as in many opinions, their employment, as judicial stilts to stalk from one isolated proposition to another. Moreover, the law is, or should be, a progressive science. It can be made so only under the guidance of the reason and spirit of the law, and not by a slavish dependence upon precedent. The doctrine of stare decisis is no doubt a salutary one, but it can be pushed too far. No principle of law should be permitted to become so case-hardened that it will not bend to the needs and demands of new times and new conditions. There was something admirable in the virile independence displayed by Chief Justice Anderson in an early English case (Gouldsborough, p. 96) where counsel suggested that there was not a single case to support an adverse ruling. "What of that?" the chief justice responded. "Shall not we give judgment because it is not adjudged in the books before? We will give judgment according to reason; and if there be no reason in the books I will not regard them."